

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

TREMICA L. KING,

Plaintiff,

v.

Case No. 04-2192-JWL

**METCALF 56 HOMES
ASSOCIATION, INC., et al.,**

Defendants.

MEMORANDUM AND ORDER

This matter is presently before the court on the motion of defendants Linda Baker and Metcalf 56 Homes Association, Inc. (Metcalf 56) to dismiss Count I of plaintiff's amended complaint (doc. 30). For the reasons set forth below, this motion is granted and Count I of plaintiff's amended complaint is dismissed with respect to these two defendants.

On December 23, 2004, defendants Baker and Metcalf 56 filed a motion to dismiss Count I of plaintiff's amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff did not file a response to the motion to dismiss within the time period provided in Local Rule 6.1(e)(2). Thus, the court could have considered and decided the motion as an uncontested motion and could have granted the motion without further notice to plaintiff. *See* D. Kan. R. 7.4. Nonetheless, in an abundance of caution, the court issued an order directing plaintiff to show good cause in writing to the court, on or before Monday, January 31, 2005, why she failed to respond to the motion to dismiss in a timely fashion. The court further

directed plaintiff to respond to the motion to dismiss on or before Monday, January 31, 2005. As of the date of this order, plaintiff has not filed a response to the show cause order and has not filed a response to the motion to dismiss.

The court concludes that dismissal of Count I of plaintiff's amended complaint with respect to these two defendants is appropriate on the grounds that plaintiff has not responded to the motion to dismiss despite having ample opportunity to do so. In so holding, the court specifically concludes that certain aggravating factors present in this case outweigh the judicial system's strong predisposition to resolve cases on their merits. *See Murray v. Archambo*, 132 F.3d 609, 611 (10th Cir. 1998) (prior to outright dismissal for failure to comply with local court rules, court must consider the degree of actual prejudice to the defendant; the amount of interference with the judicial process; and the culpability of the litigant).

Specifically, the court notes that plaintiff, as of the date of this order, has still not responded to the motion to dismiss nor has she contacted the court in any way regarding the motion. Plaintiff's failure to respond to the motion in any way and her failure to contact the court in any way demonstrates that her culpability is quite high. *Compare id.* (reversing district court's dismissal on uncontested motion where plaintiff mailed his response more than three days prior to the deadline, demonstrating "little or no culpability on his part in causing the delay"), *with Hancock v. City of Okla. City*, 857 F.2d 1394, 1396 (10th Cir. 1988) (plaintiff herself was not guilty of any dereliction where plaintiff's counsel overlooked motion and therefore failed to respond, resulting in delay of almost two weeks but, once discovered, responded promptly). Moreover, in such circumstances, denying the motion to dismiss would

prejudice defendants in terms of continued time spent and expenses incurred on a claim in which plaintiff has shown no interest even after ample notice from the court. Similarly, denying defendant's motion would interfere with the judicial process in terms of docket management and the need for finality to litigation. In other words, the court should not have to continue to manage this claim (at least with respect to these two defendants) when plaintiff herself has taken no initiative to pursue the claim. *Compare Murray*, 132 F.3d at 611 (reversing district court's dismissal on uncontested motion where plaintiff's response to motion was received one day after the fifteen-day deadline and no prejudice to defendants could have resulted from this delay, nor could it have caused interference with the judicial process), *with Hancock*, 857 F.2d at 1396 (where plaintiff's counsel overlooked motion and therefore failed to respond, resulting in delay of almost two weeks but, once discovered, responded promptly, defendant would not have been prejudiced in any legal or equitable sense by court's consideration of response and any inconvenience to the court was not so severe a burden as to justify dismissal).

For the foregoing reasons, the court grants defendant Baker and Metcalf 56's motion to dismiss Count I of plaintiff's amended complaint.

IT IS THEREFORE ORDERED BY THE COURT THAT defendant Baker and Metcalf 56's motion to dismiss Count I of plaintiff's amended complaint (doc. 30) is granted.

IT IS SO ORDERED this 4th day of February, 2005.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge